APPENDIX

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil Action No. 4768-A

J. HARVIE WILLIAMS, ET AL., *Plaintiffs,*

v.

VIRGINIA STATE BOARD OF ELECTIONS, ETC., ET AL., *Defendants.*

(Argued June 24, 1968 Decided July 16, 1968)

Before BRYAN, *Circuit Judge,* and LEWIS and MERHIGE, *District Judges.*

Howard S. Spering, of Washington, D. C., who argued the case for the plaintiffs; with whom was associated Robert L. Montague, III, of Alexandria, Virginia;

Robert Y. Button, Attorney General of Virginia; Robert D. McIlwaine, III, Assistant Attorney General; and Richard N. Harris, Assistant Attorney General, who argued the case for the defendants.

Opinion

ALBERT V. BRYAN, Circuit Judge:

Presidential electors provided for in Article II of the Constitution of the United States cannot be selected, plaintiffs charge, by a statewide general election as directed by the Virginia statute.[1] Under it *all* of the State's electors are collectively chosen in the Presidential election by the greatest number of votes cast throughout the entire State,

[1] Code of Va., 1950, Section 24-7. quoted infra. The same general plan now prevails in every State.

instead of choosing them by Congressional districts, *one* elector for each, exclusively by the votes cast in that district.

Unfairness is imputed to the plan because it gives the choice of *all* of the electors to the statewide plurality of those voting in the election—"winner take all"—and accords no representation among the electors to the minority of the voters. An additional prejudice is found in the result of the system as between voters in different States. We must reject these contentions.

The Constitution provides for the election of the President and Vice President by electors in these words:

Article II

"Section 1. . . . He [the President] shall . . . together with the Vice President . . . be elected, as follows:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; . . . ."

Article XII [Twelfth Amendment]

"The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; . . . ."

Plaintiffs' proposition is advanced on three counts: (1) the intendment of Article II, Section 1, providing for the appointment of electors is that they be chosen in the same manner as Senators and Representatives, that is two at large and the remainder by Congressional or other equal districts; (2) the general ticket method violates the "one-person, one-vote" principle of the Equal Protection Clause of the Fourth Amendment, i.e., the weight of each citizen's vote must be substantially equal to that of every other citizen. Gray v. Sanders, 372 US 368, 381 (1963); Wesberry v. Sanders, 376 US 1, 18 (1964); and (3) the general ticket system gives a citizen in a State having a larger number of electors than Virginia the opportunity to effectuate by his vote the selection of more electors than can the Virginian. On these bases the plaintiffs pray for a declaration that the Virginia statute is invalid and for an injunction against its use by the defendant State election officials.

The Code of Virginia, 1950, Section 24-7 directs:

> "§ 24-7. Electors for President and Vice President. —There shall be chosen by the qualified voters of the Commonwealth, . . . at elections to be held on the Tuesday after the first Monday in November in each fourth year [after 1948], so many electors for President and Vice President of the United States as this State shall be entitled to at the time of such election under the Constitution and laws of the United States. Each voter may vote for one elector from each congressional district of the State, as the same shall be constituted and apportioned for the election of representatives in the Congress of the United States from this State at the time when such election shall be held, and for two electors from the State at large; . . . ."

Congress has prescribed that henceforth the Representatives from each State, when more than one, be chosen by districts, 2 USC 2a, 2c. Similar provision is made by Ar-

ticle IV, Section 55 of the Constitution of Virginia as well as by statute, Code of Va., Section 24-4. Virginia has ten Representatives besides two Senators. Save to analogize the selection of electors with the selection of Senators and Representatives the plaintiffs make no point, of course, against the election statewide of the two electors corresponding to the Senators. Our discussion, therefore, will refer solely to those electors who are the counterparts of Representatives in Congress.

Throughout, it must be kept constantly in mind that the wisdom of the continued use of the electoral college for choosing the President and Vice President is not at issue here. As here posed the question recognizes the predominance of that Constitutional design. The inquiry is whether Article II, Section 1 considered alone or with Constitutional safeguards, permits the selection of the electors by a general election in which the entire electorate of the State may collectively vote at one time upon all of the electors.

Plaintiffs are ten in number, one from each of the Congressional districts of Virginia, and all of them qualified to vote in their respective districts in the coming fall election. Their brief describes their purpose:

> "This action is brought to protect and restore the full benefit of plaintiffs' right to vote. Plaintiffs seek to elect one presidential elector in, and solely by a plurality of the votes cast in, their own respective Congressional districts. They seek thereby to prevent the dilution of their own votes, and the denial of any possibility of their having any electoral representation when not part of the state-wide plurality, that now result from counting the votes of all voters throughout the state in determining the plurality of votes for the election of the one presidential elector that has been apportioned to the people resident in their respective Congressional district by virtue of their numbers.

> Thus, they seek to prevent the votes of residents in other Congressional districts of Virginia from being counted in determining the plurality of votes for the election of one presidential elector in, by, and from their own respective Congressional district."

We think they have the requisite standing to maintain the suit they plead; that it is an acceptable class action; that the defendants, save the Governor of Virginia, are proper parties, as the officials entrusted with the conduct of the election of presidential electors; and that this court has jurisdiction of the complaint. Flast et al. v. Cohen, Secretary of Health, et al., 36 L.W. 4601 (June 10, 1968); 28 USC 1343; 42 USC 1983; 42 USC 1988; Baker v. Carr, 369 US 186 (1962); Gray v. Sanders, 372 US 368 (1963); Wesberry v. Sanders, 376 US 1 (1964); Reynolds v. Sims, 377 US 533 (1964); F.R.Civ.P. 23. Because of its special circumstances, we do not think Penton v. Humphrey, 264 FSupp 250 (S.D.Miss. 1967—3-judge court) dictates rejection of the present action; nor do we believe on reading of the pleadings in State of Delaware v. State of New York, 385 US 895 (1966), cited by the defendants, that it forecloses entertainment of plaintiffs' plaint.

I. The first argument of the plaintiffs is that the college of electors was envisaged by the Constitution as delegates of the people—although to exercise their own judgment—in naming the President and Vice President, thus according the people a truer representation in the choosing of these officers. The electors, they aver, were to be as directly and immediately representative of the people as the college method permitted.

To this extent and to this end, a voice in selection of the President and Vice President, the argument is, was avouched the people in the same measure as is assured them in picking members of the legislative branch of the Federal government. If, continue plaintiffs, Representatives in

Congress are—in fairness to the people—chosen by districts, so should be electors.

Primary citation for this position is the parallelism drawn by the Constitution in the numerical correspondence of electors with the State's total of Senators and Representatives. This conformity is marked also by the requirement of varying the number of electors as the number of Representatives change.

Admittedly, the designation of all presidential electors by the ballot of all who voted throughout the State does not produce a group as representative of the people as would an election of one elector by each district alone. For instance, as the plaintiffs demonstrate, while in 1960 the popular vote in Virginia for the Republican nominee was only 52.4%, and the Democratic nominee received 47%, of the vote cast, the Republican was credited with 100% of Virginia's electoral votes and the Democrat with none. With the popular count reversed, the candidates in 1964 were favored and unfavored in electoral votes by the same formula. If plaintiffs' contention for single-elector district voting had prevailed, it would have been possible for the Democratic and Republican parties to have had proportionate representation among Virginia's electors in the same degree as they shared in the statewide tally.

Many of the Brahmins of the Constitutional Convention, such as Thomas Jefferson, James Madison and James Wilson, held the district plan more advisable. Indeed, Virginia and several of the other States for some years chose electors by district. However, it was Jefferson who advised Virginia to switch to the general ticket. His advice sprang from a desire to protect his State against the use of the general ticket by other States. He found that when chosen by districts, Virginia's representation among the electors was divided, while other States made their votes mean more

in the college by adoption of the general ticket scheme of selection. This contention is no less true today.[2]

Thus, it cannot be safely said that the draftsmen of Article II, Section 1 believed that the electors must be chosen by congressional or other districts, as plaintiffs here contend. The clause literally leaves to the State legislature the appointment of electors "*in such manner*" as it may direct. Bestowal of this discretion is emphasized in McPherson v. Blacker, 146 US 1 (1892). There the history of Article II is so fully traced that repetition of it may well be omitted. Nevertheless, that decision did no more than hold permissible and valid Michigan's determination to select electors by districts. Anything in the opinion appearing to rule on the acceptableness of some other plan is obiter; it is not authority for the assertion that the manner a State legislature adopts to appoint electors is beyond judicial review.

II. On the contrary, in our opinion the authorization of each State by Article II to "appoint, in such manner as the Legislature thereof may direct," is "subject to possible constitutional limitations". Ray v. Blair, 343 US 214, 227 (1952). In short, the manner of appointment must itself be free of Constitutional infirmity.

It is on this premise that plaintiffs, in their second argument, ask us to declare the general ticket system invalid as "debasing, abridging or misrepresenting the weight of the votes of citizens of the United States in presidential elections unconstitutionally". Principal reliance for this argument is the "one-person, one-vote" doctrine announced in Gray v. Sanders, supra, 372 US 368, 381 (1953) and reaf-

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[2] For a comprehensive and thoughtful disquition upon the election of electors, consult Peirce, *The People's President* (1968), and the Memorandum of the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, October 10, 1961.

firmed in Wesberry v. Sanders, supra, 376 US 1, 18 (1964). Clearly, these decisions do condemn any such trespass. Reynolds v. Sims, 377 US 533, 555 (1964).

However, in our judgment the general ticket does not come within the brand of these decisions. Actually, the system is but another form of the unit rule. A familiar application is in the casting of a constituency's single vote by its several delegates in a convention. It also appears in Article II (Twelfth Amendment) making provision for the election of the President by the House of Representatives when no majority is obtained in the electoral college. Representatives cast the vote of their State according as the greater number of them vote.

We see nothing in the unit rule offensive to the Constitution. Concededly, its effect is exceptionable in many aspects. Some are enumerated in the Memorandum of the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, at p. 22, supra footnote 2. Among possible objectionable results it listed disfranchisement of voters and the possibility of "minority presidents", that is one having a majority of electoral votes but not having a larger count in the popular vote than one of his opponents. Added to these detractions is the greater opportunity for the creation of "splinter" parties.

Discussing the disfranchisement defect, the Memorandum continues, p. 23, in this language:

> "Above the minimum of three, additional electoral votes to which a State is entitled are based upon population. Nevertheless as much as 49 percent of a State's voters may see the portion of its electoral votes attributable to them cast for a candidate whom they oppose. It is not merely that their votes are wasted in the sense that they were cast for a loser. The unit

rule not only extinguishes the voice of State minorities, but it allows State majorities to speak for them. . . .

* * * * *

"Some defenders of the unit-rule system dispute the logic of this argument. They answer that no votes are lost when validly cast in an election; that they are actually counted toward the final decision and if, insufficient for victory, they have simply exhausted their power as votes.

"However, the effect of the unit rule is to exhaust the power of millions of individual votes at the State level before the election is actually determined at the national level. They lose their effect on the outcome at a preliminary stage in the counting. These voters are disfranchised in the sense that their votes have no bearing on the national electoral vote totals which determine the winner.

"It is sometimes said that the thousands or millions of voters in a State whose candidate was defeated in its popular election might as well not have voted at all because the State's electoral vote would have gone the same way if they had stayed at home. This is not totally realistic. If they had not voted at all, one vote would have been sufficient to deliver the State's electoral vote for the opposing candidate. By voting, the minority party voters have set a figure which must be matched and exceeded by opposing voters before the State's electoral vote bloc is awarded to the opponent."

Many other reputable authorities have inveighed against the system when applied to the selection of electors. Their strictures include excoriation of the electoral college both as an original and current institution.

Notwithstanding, it is difficult to equate the deprivations imposed by the unit rule with the denial of privileges outlawed by the one-person, one-vote doctrine or banned

by Constitutional mandates of protection. In the selection of electors the rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidous. No such evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone.

Furthermore, adoption of the general election system in Virginia is grounded on what has historically been deemed to her best interests in the workings of the electoral college. The legislature of the Commonwealth had the choice of appointing electors in a manner which will fairly reflect the popular vote but thereby weaken the potential impact of Virginia as a State in the nationwide counting of electoral ballots, or to allow the majority to rule and thereby maximize the impact of Virginia's 12 electoral votes in the electoral college tally. The latter course was taken, and we cannot say unwisely.

Reverting to the unit rule, it has never been rejected as unfair in the election of members of the United States House of Representatives when two or more or all are running at large, that is statewide. In the midst of the one-person, one-vote decisions, this practice was noticed without any question of its validity. In Wesberry v. Sanders, supra, 376 US 1, 7, the Court said:

> "We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several states' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. This rule is followed automatically, of course, when Representatives are chosen as a group on

a statewide basis, as was a widespread practice in the first 50 years of our Nation's history." (Footnotes omitted.)

In this consideration it is notable that Congress, in its amendments of the statute relating to the election of Representatives by districts, has expressly countenanced the election of them from the "State at large". 2 USC 2a and 2c, supra. Presumably Congress would not have done so if it meant a breach of the one-person, one-vote principle, by then securely established. If the plan is legally permissible in the selection of Congressmen, it may hardly be stigmatized as unlawful in choosing electors.

III. Further instances of inequality in the ballot's worth between them as Virginia citizens, plaintiffs continue, and citizens of other States, exists as a result of the assignment of electors among the States. To illustrate, New York is apportioned 43 electors and the citizen there, in the general system plan, participates in the selection of 43 electors while his Virginia compatriot has a part in choosing only 12. His ballot, if creating a plurality for his preference, wins the whole number of 43 electors while the Virginian in the same circumstances could acquire only 12. Again, party-wise, it is alleged that on a national basis, the State unit system's cancellation of States' minority votes causes inequities and distortions of voting rights among citizens of the several States, by arbitrarily isolating the effects of votes cast by persons of a particular political persuasion or party in one State, from those cast by voters of the same persuasion or party in other States.

Disparities of this sort are to be found throughout the United States wherever there is a State numerical difference in electors. But plainly this unevenness is directly traceable to the Constitution's presidential electoral scheme and to the permissible unit system.

For these reasons the injustice cannot be corrected by suit, especially one in which but a single State is impleaded. Litigation of the common national problem by a joinder of all the States was evidently unacceptable to the Supreme Court. State of Delaware v. State of New York, supra, 385 US 895. Readily recognizing these impediments, plaintiffs point to the district selection of electors as a solution, or at least an amelioration, of this interstate inequality of voters. However, to repeat, this method cannot be forced upon the State legislatures, for the Constitution gives them the choice, and use of the unit method of tallying is not unlawful.

Adverting to certain procedural points made by the parties, the Governor of Virginia, in view of his detachment from the election machinery in the State, we find it neither a necessary nor a proper defendant here, and should be dropped as a party; we overrule all objections which have been reserved in the admission of evidence on the hearing of this cause.

The merits and advantages of the plaintiffs' thesis are readily recognizable. We do not discount or deride their motives, but we are of the opinion that a compulsory compliance with their demand or any other proposed limitation on the selection by the State of its presidential electors would require a Constitutional amendment. Also, we observe, that the change to a district system would not, for the reasons expressed by Jefferson, warrant Virginia or any other State to adopt an individual plan. Whatever the pattern, to succeed it must be nationwide. As was aptly stated by Professor Robert G. Dixon, ". . . any modification of the electoral college system should be on a uniform national basis in order to avoid creating additional inequities on an interstate basis."[3]

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[3] Remarks before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, July 14, 1967, regarding proposed amendments to the Constitution relating to nomination and election of the President and Vice President.

As Virginia's design for selecting presidential electors does not disserve the Constitution, we decline to place an injunction upon its effectuation. Plaintiffs' complaint will be dismissed.

Order on Opinion

Upon consideration of the pleadings, the stipulations of counsel, the exhibits and the entire record in this action, as well as the arguments thereon of counsel orally and on brief, the court for the reasons stated in its opinion filed herewith finds, adjudges and orders as follows:

1. That the Governor of Virginia be, and he is hereby, dropped as a party defendant herein;

2. That the prayers of the complaint be, and they are hereby denied, and that the complaint herein be, and it is hereby, dismissed; and

3. That the defendants recover of the plaintiffs the costs of this action, and nothing further remaining to be done in the cause, it be stricken from the docket.

ALBERT V. BRYAN
United States Circuit Judge

OREN R. LEWIS
United States District Judge

ROBERT R. MERHIGE, JR.
United States District Judge

Dated: July 16, 1968

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that J. Harvie Williams, Julius Prufer, Edward West, Jr., Cecil C. Hatfield, Robert A. Peck, Bernard W. Freund, Grace T. Seat, Grayson G. Fentriss, William Grossman, and Joe E. Swiger, all citizens of the United States resident in Virginia and being all of the plaintiffs herein, hereby appeal to the Supreme Court

of the United States from all portions of the final Order of Opinion, entered July 16, 1968 by the three-judge Court herein after a hearing, that dropped the Governor of Virginia as a party defendant herein, that denied the prayers of the complaint for a declaratory judgment and for a permanent injunction against the defendants and dismissed the complaint, that ordered that the defendants recover of the plaintiffs the costs of this action, and that ordered that this action be stricken from the docket.

II. This appeal is taken pursuant to 28 U.S.C.A. 1253 and the sixty-day rule for such appeals from a final judgment, order or decree, as provided in 28 U.S.C.A. 2101.

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September 12, 1968

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No.

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Plaintiffs

v.

VIRGINIA STATE BOARD OF ELECTIONS, L. STANLEY HARDAWAY, Secretary, Richmond, Virginia

MILLS E. GODWIN, JR., Governor of the Commonwealth of Virginia, Richmond, Virginia

MARTHA BELL CONWAY, Secretary of the Commonwealth of Virginia, Richmond, Virginia

Defendants

Complaint for Declaratory Judgment and for Injunctive Relief

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1. This is a class action for a declaratory judgment and for injunctive relief to declare the state-wide general ticket system, imposed by the Commonwealth of Virginia, for

electing those 10 of its 12 presidential electors whose offices exist solely by virtue of its having 10 Representatives in Congress, to be inequitable, distortive of citizens' votes, and unrepresentative of the people whose numbers establish the 10 Congressional districts into which Virginia is divided for the purpose of separate and distinct representation of the people in each such district in the United States House of Representatives; and to be illegal and unconstitutional under the provisions of Article II, Section 1, of the Constitution of the United States, and under the provisions of the Twelfth Amendment and of the Fourteenth Amendment of the Constitution of the United States, among other provisions thereof and of the United States Code.

2. This action invokes the provisions of the Privileges and Immunities Clause, of the Due Process Clause, and of the Equal Protection Clause, of the Fourteenth Amendment of the Constitution of the United States, and sections of the United States Code enacted in pursuance thereof, to protect and restore the full benefit of the plaintiffs' right to vote under said provisions of the Fourteenth Amendment and related sections of the United States Code, under the provisions of Article II, Section 1, of the Constitution, under the provisions of the Twelfth Amendment of the Constitution, and under the apportionment provisions of Section 2 of Article I of the Constitution and of Section 2 of the Fourteenth Amendment thereof, among other provisions of the Constitution of the United States and of the United States Code.

3. Jurisdiction of this Court exists under Article III, Section 2 of the Constitution of the United States, and under the provisions of 28 USCA 1331 (federal question), 28 USCA 1343, 42 USCA 1983, 42 USCA 1988 (deprivation of rights of citizens), 28 USCA 2201, 28 USCA 2202 (declaratory judgment), and 28 USCA 2281 and 28 USCA 2284 (three-judge court for injunction against enforcement

of state statute on constitutional grounds). The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000).

4. Plaintiffs herein are each citizens of the United States and citizens of, and duly registered voters under the laws of, the Commonwealth of Virginia. Plaintiffs are residents and duly qualified voters each of a different one of the ten Congressional districts of Virginia, and each of said districts is represented herein by one or more of the plaintiffs. Plaintiffs bring this action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, in behalf of themselves and in behalf of all other citizens of the United States, who are also residents and duly qualified voters of one of said Congressional districts of Virginia and who, like themselves, plan to participate in the election of the President and Vice President of the United States by voting in the election of presidential electors and have a common interest in protecting their individual and several voting rights in such elections, their right to effective representation therein, and the rights of representation therein of minors and others resident in their respective Congressional districts who are ineligible, or otherwise unable, to vote in such elections.

5. The defendants herein are Mills E. Godwin, Jr., Governor of the Commonwealth of Virginia, Martha Bell Conway, Secretary of the Commonwealth of Virginia, and the State Board of Elections, a separate and permanent board created within the office of said Secretary of the Commonwealth under Chapter 3 of Title 24, Elections, of the Code of Virginia (1946, p. 483; Michie Suppl. 1946, sec. 83a; 1948, p. 418; R.P. 1948, sec. 24-24; 1956, Ch. 392, et seq.).

6. The number of electors to be chosen in Virginia, under Article II, Section 1 of the Constitution of the United States, for the election of the President and the Vice President of the United States, is equal to the whole num-

ber or sum of its 2 Senators and the 10 Representatives to which it is entitled in Congress, the latter number being determined, pursuant to Article I, Section 2, and the Fourteenth Amendment, Section 2, of the Constitution of the United States, by apportionment among the several states according to their respective numbers, counting the whole number of persons in each state.

7. Under said Article II, Section 1, of the Constitution of the United States and said apportionment provisions of Article I, Section 2, and of the Fourteenth Amendment, Section 2, of the Constitution of the United States, the right to elect one elector, who is the counterpart of a Representative in Congress, lies, fundamentally and constitutionally, in the people based upon their numbers requisite to constitute a Congressional district, since the right to elect each such presidential elector follows the number of people requisite to entitle them to a Representative in Congress and to constitute a Congressional district under the national apportionment as they migrate from state to state or their numbers within a state otherwise increase or decrease disproportionately to the changes of population in other states.

8. Pursuant to Section 24-7, Chapter 1 of Title 24 of the Code of Virginia (Code 1919, sec. 74) and Sections 24-290.1 to 290.6, Chapter 11.1 of Title 24 of the Code of Virginia, in any election for President and Vice President of the United States, each (and every) voter in the State may vote "for one elector from each Congressional district of the State, as the same shall be constituted and apportioned for the election of representatives in the Congress of the United States. . . . . and for two electors from the State at large", and each political party, or other group of qualified voters, submitting a list of names of electors selected by them is expected to include therein "one elector residing in each Congressional district and two from the State at large."

9. Pursuant to Sections 24-290.4 to 290.6, Chapter 11.1 of said Title 24 of the Code of Virginia, the defendant State Board of Elections is required to certify to the Secretary of each local election board "the form of official ballot which shall be uniform throughout the State" and on said ballot shall be printed the name of each political party or group and under the party name in parenthesis the words "Electors for ..... President and ..... Vice President" with the names of the candidates filled in, after which the names of the electors nominated by said political party or group shall follow, and a square shall be printed preceding the name of each such party or group, in which the qualified voters shall designate their preference for candidates for electors of President and Vice President by marking the square preceding the name of the party or group of his choice, and ballots so marked shall be counted as if squares preceding the names of the individual electors nominated by the respective political party or group had been so marked. A true and correct copy of a sample of such uniform ballot used in Powhatan County for the 1964 election for President and Vice President, which is attached hereto, marked Exhibit A, and made a part hereof, clearly illustrates the practice under said provisions of Title 24 of said Code of Virginia.

10. Pursuant to Section 24-276 and Section 24-278, Chapter 11.1 of said Title 24 of the Code of Virginia, the person having the highest number of votes for any office shall be deemed to have been elected to such office and this applies to elections for the office of elector of President and Vice President of the United States. Such elector candidates, nominated by the State conventions of any such political party or group, shall be expected, if elected, to vote in the Electoral College for the presidential and vice presidential nominees of any national convention to which the said State convention elects delegates, as provided in Section 24-290.6 of said Chapter 11.1.

11. Under the foregoing election laws of Virginia, a state-wide general ticket system of voting for electors of President and Vice President is established and assured, with the result that all twelve (12) electors elected in Virginia are of one party or group only and, consequently, the state's 12 electoral votes are consistently cast, counted and certified in the Electoral College entirely for the one person for President and the one person for Vice President as nominated by the political party or group receiving the highest number of votes on a state-wide basis, notwithstanding the otherwise several and divisible character of 10 of the State's 12 electors and their electoral votes.

12. The several and divisible character of 10 of Virginia's electors and their electoral votes (a) is established under Article II, Section 1, of the Constitution of the United States and the apportionment provisions of Article 1, Section 2, and of the Fourteenth Amendment, Section 2, of the Constitution of the United States, as stated above in paragraph 7, (b) is clearly recognized by the provision of the State law, cited above in paragraph 8, that each (and every) voter in the State may vote "for one elector from each congressional district of the State, as the same shall be constituted and apportioned for the election of representatives in the Congress", and (c) is also recognized by the provisions of the Twelfth Amendment of the Constitution of the United States contemplating that a state's electoral votes will often be divided as to the persons voted for as President and as to the persons voted for as Vice President. A copy of the map showing the 10 Congressional districts of Virginia as printed in the Congressional Directory for the 90th Congress, Second Session, published January 1968, is attached hereto, marked Exhibit B, and made a part hereof.

13. As a result of the foregoing election laws and practices of Virginia, all voters in Virginia who shall have voted for the elector candidates of a political party or group

that receives less than the highest number of votes on a state-wide basis, are wholly without any representation by any electoral vote whatsoever in the Electoral College when the members of that body from Virginia vote for persons for President and Vice President of the United States,

(a) even if and when the number of such voters so voting may aggregate as much as forty-nine percent (49%) of the total of all popular votes cast in Virginia in such presidential election; and

(b) even if and when the number of such voters so voting shall aggregate and constitute a majority, or the highest number, of the popular votes cast in one or more of the 10 Congressional districts.

14. The foregoing statutes and practices of the Commonwealth of Virginia, are inequitable, illegal, and unconstitutional under Article II, Section 1, the Twelfth Amendment, and the Fourteenth Amendment of the Constitution of the United States in that plaintiffs are denied fair, equitable, proportionate, just, and reasonable representation and weight in the voting in the Electoral College by the electors from Virginia, since the weight of plaintiffs' votes, among all the popular votes cast in Virginia, will inevitably either

(a) be magnified and distorted, when on the winning side, from a plurality, however narrow the margin, to one hundred percent (100%) of Virginia's electoral votes; or

(b) be completely ignored and debased, when on the losing side, and be invidiously misrepresented as if supporting the winning plurality.

15. Under recent decisions of the United States Supreme Court the "one-man one-vote" principle of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States requires that, whenever and wherever in the United States voting by any of the people

is provided for in state or federal elections, the citizens of the United States are entitled to be fairly, justly, and equitably represented and effectively weighted, by district units fairly related to their numbers, in the outcome of such election; and they are entitled to have their right to vote protected against being abridged, debased, diluted, cancelled, destroyed, discriminated against on the basis of place or residence or on any other arbitrary basis, or otherwise made ineffective or unrepresentative, by or under any laws or practices of any state, or by or under any acts of any officials thereof or of any other persons. See Reynolds v. Sims et al., 377 U.S. 533, 554-568, 84 S. Ct. 1362, 1377-1382 (1964).

16. The right of citizens of the United States to vote for electors of President and Vice President of the United States, as recognized and dealt with in the provisions of Section 2 of the Fourteenth Amendment of the Constitution of the United States and in the provisions of the United States Code 42 USCA 1971, is parallel in such provisions and otherwise under the Constitution of the United States, in all essential respects, to the right to vote for Senators and for Representatives respectively, since the number of electors to be chosen from the respective states is declared in Article II, Section 1 of the Constitution of the United States to be the same as the number of Senators and Representatives to be elected by the people from the respective states, and the Twelfth Amendment of the Constitution of the United States clearly contemplates that the electoral votes of a state will often be divided as to the persons voted for as President and as to the persons voted for as Vice President, as would likely occur when one elector is elected in and by each Congressional district.

17. Election of one elector in each Congressional district solely by the citizens voting in the respective district, in the same manner as Representatives in Congress are elected in and by single-member districts as a consequence of the

aforesaid apportionment provisions of the Constitution, would assure that the election of the President and the Vice President will be based upon the same units of representation as are effective in the election of United States Senators and Representatives in Congress. Under these circumstances, the strangulation of Government that often has occurred in the past due to strongly divergent or conflicting policies of the Executive Branch and the Legislative Branch would be much less likely to develop.

18. The non-parallel, inequitable, unrepresentative and unconstitutional basis of electing the President and Vice President under the state-imposed, state-wide general ticket system of electing the electors of the President sets up, within the state and nationally among the states, a constituency for the Executive Branch altogether different from that of the Legislative Branch of the national Government, and can only operate in the direction of creating critical impasses between the two branches of Government. Plaintiffs as citizens of the United States are irreparably injured by the abridgement of their right to fair and just representation in, and of their right to have their votes effectively and fairly weighted in, the election of the President and Vice President. They are also immeasurably and irreparably injured when their national Government is thus strangled and ineffective in serving their interests, as expressed, on the one hand, through representation of the states and of the people in the two Houses of Congress, the Senate and the House of Representatives, and, on the other hand, through the distorted representation of the states only in the election of the President and Vice President.

19. The state-wide general ticket system of electing presidential electors in Virginia regiments the state's voters into a single state-wide count and a single voice for its voters expressed solely in their capacity as citizens of the state, and unconstitutionally contravenes, dilutes, and destroys all opportunity and right of its citizens to have any effec-

tive voice in their other capacity as citizens of the United States by having their votes counted separately in their own Congressional districts, as smaller, essentially equal national units, each electing, and effectively represented by, the one elector to which the state is entitled solely by reason of the whole number of persons residing within each such district. Congressional districts in each of the states are required to be as nearly equal in population as is practicable under the rule in Wesberry v. Sanders, 376 U.S. 1, 84 S. Ct. 526 (1964).

20. Such failure of Virginia to provide for election of presidential electors by and from each respective district, as is provided in the case of the election of Representatives in Congress, contravenes the basic structure of the Government of the United States, and the basic structure of the government of every state in the Union guaranteed under Article IV, Section 4, of the Constitution of the United States, as republican in form of government based on representatives of the people of the United States elected in each of their several essentially equal Congressional districts apportioned among the several states pursuant to Article I, Section 2, and the Fourteenth Amendment, Section 2, of the Constitution of the United States.

21. Said state-wide general ticket system of electing electors and the resultant casting of their electoral votes, imposed by the Commonwealth of Virginia, is illegal and unconstitutional in that it violates the "one-man one-vote" principle of the Equal Protection Clause, and other provisions of Section 1, of the Fourteenth Amendment of the Constitution of the United States, among plaintiffs and other citizens resident in Virginia, through the many distortions, debasements, restrictions, and other misrepresentations of their votes and of their right to vote, and through the many denials of constitutional representation of the whole number of people who constitute their respective Congressional districts, all as recited substantially in many paragraphs of this Complaint.

22. Said state-wide general ticket system of electing electors and the resultant casting of their electoral votes, imposed by the Commonwealth of Virginia and other states, is inequitable and unconstitutional in that it violates the "one-man one-vote" principle of the Equal Protection Clause, and other provisions of Section 1, of the Fourteenth Amendment of the Constitution of the United States, among plaintiffs and other citizens of the United States, by giving different weight in the election of President and Vice President of the United States to the votes of citizens of the United States who are residents of one state from the weight given to the votes of other citizens of the United States who are residents of another state. For example, the vote of a citizen residing in the State of New York relates to, and can affect, the election of 43 electors and the consequent casting of their 43 electoral votes as a single block in the Electoral College, while the vote of a citizen residing in Virginia relates to, and can affect, the election of only 12 electors and the consequent casting of their 12 electoral votes as a single block in the Electoral College.

23. Said state-wide general ticket system of electing electors in Virginia, in violating the "one-man one-vote" principle of the Equal Protection Clause, and other provisions of Section 1, of the Fourteenth Amendment of the Constitution of the United States, irreparably and prejudicially injures plaintiffs and their fellow citizens of the United States resident in Virginia in that, with all Congressional districts in the United States required to be essentially equal in population, approximately 10 times as many citizens must vote for a particular party's nominees for President and Vice President in Virginia as in Delaware, or Vermont, or Wyoming, or Nevada, or Alaska (each of which has only one Congressional district), before their voting can have any positive effect or weight whatsoever in the election of the President and the Vice President through a vote or votes cast in the Electoral College.

24. Said state-wide general ticket system of electing all electors of a state puts a premium on fraud in elections, and exaggerates beyond all reason the power of splinter parties, which can affect the whole electoral vote of a state through control of the relatively small margin of the winning plurality of the State's entire popular vote, as in the 1948 elections when the supporters of Henry Wallace effectively held the balance of power in New York State between Truman and Dewey with their 509,000 votes, drawn primarily from Truman, throwing the 47 electoral votes of New York to Dewey who had a plurality of only 61,000 votes over Truman out of the total of approximately 6,100,000 votes cast in the State.

25. If, on the other hand, one elector were elected solely in and from each Congressional district in the United States and all additional electors to which the state is entitled were elected on a state-wide basis, each citizen of the United States, without regard to his state of residence, would normally vote only for three (3) electors, one on a district basis equivalent to his Congressional district's one representative in Congress, and two on a state-wide basis equivalent to his state's two United States senators. Of course, if any representative-at-large were required to be elected by a state-wide vote, an additional elector would be elected by a state-wide vote. In any event, if a plurality in a Congressional district voted for the elector from that district who was of a different national political party from that party voted for by a plurality of all the state's voters, the elector from such district would cast his vote in the Electoral College for the presidential and vice-presidential nominees of a different political party than would the electors chosen on a state-wide basis.

26. Thus, if the state-wide general ticket system were enjoined as unconstitutional, as prayed herein, the election of one elector in, and solely by the voters of, each Congressional district would provide both an essentially equal basis

oting for electors of the President and the Vice Presi-
by all citizens of the United States, regardless of their
e or state of residence, and also the maximum oppor-
ty for an effective voice of the voters determined and
ıted on the basis of essentially equal districts smaller
the state, not diluted and debased by being regimented
one massive hopper for counting and determining solely
state-wide basis a single voice of the state, and, there-
, effectively expressive of their views and interests as
ens of the United States resident in respective Con-
sional districts and not solely as citizens of the state
nitted only one voice.

.. Such election of one elector in, and solely by the
rs of, each Congressional district would then conform
ıe practice of election of electors by districts originally
ɔted and followed in the Commonwealth of Virginia in
irst three presidential elections in the United States.
ımber of the other states also elected electors in, and
y by the voters of, respective districts in a number of
arly presidential elections prior to 1836. A district
od of election of electors, when adopted by the State of
igan, was ruled constitutional in McPherson v. Blacker,
J.S. 1, 13 S. Ct. 3, 36 L. Ed. 869 (1892).

The state-wide general ticket system of electing elec-
ınd the consequent casting of all electoral votes of
e for the nominees for President and Vice President
political party inequitably and unconstitutionally pre-
even the possibility that more than one nominee for
ent might receive any of the electoral votes of such
in contravention of the clear provision of the Twelfth
lment of the United States Constitution contemplat-
ıt two or more nominees for president, and/or two or
ıominees for vice-president, may each receive one or
ɔf the electoral votes of a particular state, as ex-
l in the mandatory provision thereof that the electors
respective state "shall name in their ballots the per-

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son voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of *all* persons voted for as President, and of *all* persons voted for as Vice President, and the number of votes for *each*, . . ."

29. By reason of the foregoing premises, there exists between the parties plaintiff and the parties defendant in this action an actual justiciable controversy within the purview of the Declaratory Judgment Act, Section 2201 of Title 28 of the United States Code, and the plaintiffs are entitled to have their rights in this action adjudged and declared herein.

30. Plaintiffs and all others in the Class represented by them will suffer irreparable injury and immeasurable damages until fair, just and equitable weight is assured for their votes, and constitutional representation is assured to them and all other persons in their respective Congressional districts, in presidential elections by the election solely in and by each respective Congressional district of district electors representative of them as citizens of the United States by the granting by this honorable Court of the relief requested herein. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs, in behalf of themselves and of all other citizens of the United States resident in Virginia, pray that this honorable court:

1. Adjudge, declare and decree

(a) The rights of the plaintiffs in the premises when voting for electors for the election of the President and the Vice President of the United States under the provisions of the Constitution of the United States, of the laws of the United States, and of the election laws of Virginia.

(b) That the election laws of Virginia pertaining to presidential elections are inequitable, unrepresentative, illegal and unconstitutional insofar as they provide that

(i) each and every voter in the Commonwealth may vote for one elector from each and every Congressional district of the state

(ii) the official ballot for election of electors shall be uniform throughout the state,

(iii) the names of all the electors nominated by each political party or group shall appear on the ballot following the name of the party or group and the names of its nominees for President and Vice President, with a square printed only preceding the name of each political party or group, and a marking in such square shall be counted as if squares preceding the names of all of the individual electors nominated by such party or group had been so marked.

(c) That the plaintiffs as citizens of the United States and residents of Virginia are entitled under the provisions of the Constitution of the United States and of the laws of the United States, to have one elector chosen from, and elected by a plurality solely of the voters voting in, the respective Congressional district in which they reside and elect their Representative to Congress.

2. Enter a decree enjoining the defendants and each of them in their capacities as officers, or as a separate and permanent official board, of the Commonwealth of Virginia

(a) from continuing to provide for each and every voter in the Commonwealth to vote for one elector of President and Vice President from each and every Congressional district of the State;

(b) from continuing to prevent, by any means, the election of one elector of President and Vice President chosen from each Congressional district by a plurality

solely of the voters in the respective Congressional district in which they reside and also elect their Representative to Congress;

(c) from continuing to provide an official ballot for election of electors of President and Vice President that is uniform throughout the state;

(d) from continuing to provide that the names of all electors of President and Vice President nominated by each political party or group as from one of the respective Congressional districts shall appear on the official ballot in each county, city and Congressional district in the state and can be voted for only on a state-wide basis by all voters in the state and solely as a single block together with all other such electors of the state by a single marking on the ballot in the square preceding the name of the respective political party or group by which such list of electors were nominated.

(e) from continuing to provide that a vote marked on an official ballot in a presidential election in the square preceding the name of the political party or group of the voter's choice shall be counted as if squares preceding the names of the individual electors nominated by such party or group as from any Congressional district, other than the one Congressional district in which such voter has voted, had been so marked.

(f) from continuing to count a vote marked on an official ballot in a presidential election in the square preceding the name of the political party or group of the voter's choice as constituting a vote for any of the individual electors nominated by such party or group as from any Congressional district, other than for the one individual elector so nominated by such party or

group as from the one Congressional district in which such vote shall have been cast.

3. Such other, further and different relief as this honorable Court may deem equitable, constitutional and appropriate in the premises.

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(Exhibits A and B Follow)

Exhibit A

COMMONWEALTH OF VIRGINIA

SAMPLE BALLOT

POWHATAN COUNTY

GENERAL ELECTION

Tuesday, November 3, 1964

FOR PRESIDENT AND VICE-PRESIDENT

☐ **Democratic Party**

(Electors for LYNDON B. JOHNSON for President, and HUBERT H. HUMPHREY for Vice-President)

At Large.....CHARLES R. FENWICK
At Large.....WILLIAM W. JONES
1st District....HOWARD H. ADAMS
2nd District....EDWARD L. BREEDEN, JR.
3rd District....DR. RUSSELL V. BOWERS
4th District....N. G. HUTCHESON
5th District....J. GARNETT DAVIS
6th District....J. E. GENE TYLER
7th District....CHARLES H. DAVIDSON, JR.
8th District....RANDOLPH H. PERRY
9th District....TOM B. FUGATE
10th District....RALPH G. LOUK

☐ **Republican Party**

(Electors for BARRY M. GOLDWATER for President, and WILLIAM E. MILLER for Vice-President)

At Large.....FRANK GRAVELY
At Large.....WILLIAM A. QUICK
1st District....MRS. JENNINGS RICH
2nd District....B. B. LIPSCOMB
3rd District....J. CALVITT CLARKE
4th District....CHARLES E. HUNTER
5th District....JOSEPH C. LUMPKIN
6th District....E. D. HILTEN
7th District....D. WAMPLER EARMAN
8th District....ROBERT R. HARMON
9th District....DAVID H. FRACKLETON
10th District....CARL A. MARSHALL

☐ **Socialist Labor Party**

(Electors for ERIC HASS for President, and HENNING A. BLOMEN for Vice-President)

At Large.....MELVIN L. MAUCK
At Large.....ELIZABETH DORN
1st District....EDWARD A. DORN
2nd District....EDWARD SOLOMON
3rd District....WILLIAM C. GRIGG
4th District....ETHEL B. GALBRAITH
5th District....WILLIAM H. WOODING
6th District....WILLA H. OWENS
7th District....URIAH McKENDALL WESTBROOK
8th District....JOHN H. BACHELDER
9th District....MARY BARHAM
10th District....PHILLIP HARDING CATE

Exhibit B

Maps of Congressional Districts 869

VIRGINIA

(10 districts)